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No. 90-79

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD B. KAY,

Petitioner,

v.

BREMER EHRLER AND THE KENTUCKY BOARD OF ELECTIONS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a losing defendant may avoid the payment of attorney's fees under 42 U.S.C. § 1988 solely because the action was brought by an attorney who represented himself.

PARTIES TO THE PROCEEDINGS

There are no petitioners or respondents in addition to those named in the caption.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 900 F.2d 967. The opinion of the district court (Pet. App. 12a-17a) and the report and recommendation of the magistrate (Pet. App. 19a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1990. Pet. App. 29a. The petition for a writ of certiorari was filed on July 11, 1990, and was granted on October 1, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The 1976 Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, provides in pertinent part as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT

Petitioner, an attorney, brought a federal lawsuit on his own behalf in January, 1988 challenging the constitutionality of various Kentucky statutes governing the Commonwealth's presidential primaries. Approximately one year later, the district court granted summary judgment in petitioner's favor on virtually all of his substantive claims. Nonetheless, the court denied petitioner's request for attorney's fees under the 1976 Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, on the ground that an attorney who represents himself is ineligible for such fees. Pet. App. 16a. In a split decision, the court of appeals affirmed the denial of attorney's fees. *Id.* at 1a-11a.

The present lawsuit is actually petitioner's second challenge to the constitutionality of Kentucky's presidential primary statutes. Petitioner, a resident of Florida, has on more than one occasion run as a candidate for the office of President. Early in 1980, petitioner notified the Kentucky Board of Elections (the "Board") that he wished to appear on the Kentucky Democratic presidential primary ballot pursuant to Ky. Rev. Stat. § 118.580 (repealed in 1982). That statute provided that the Board shall nominate and place on the ballot presidential primary candidates, but it limited that opportunity, for those not qualifying by petition, to "all those [who are] generally advocated and nationally recognized" presidential candidates. On April 2, 1980, the Board met to select names

for the presidential primary ballot. At that meeting it determined that petitioner should not be placed on the ballot. Twelve days later, petitioner, acting pro se, filed suit in federal district court, alleging that Ky. Rev. Stat. § 118.580 was unconstitutional because of its "potential for discriminatory treatment of persons such as the [petitioner]." *Kay v. Mills*, 490 F. Supp. 844, 850 (E.D. Ky. 1980).

On April 23, 1980, the district court entered a preliminary injunction prohibiting the printing or distribution of Kentucky Democratic primary ballots that did not include petitioner's name. Nine days later, the court issued an opinion holding the statute unconstitutional. *Kay v. Mills*, *supra*. As a remedy, the court ordered that petitioner's name be placed on the ballot. 490 F. Supp. at 854-55. Although petitioner was the prevailing party and handled the case pro se, he did not seek attorney's fees.

In 1982, two years after the district court rendered its decision, the Kentucky General Assembly repealed Ky. Rev. Stat. § 118.580. In 1986, however, it adopted an identically worded statute: Ky. Rev. Stat. § 118.581. Pet. App. 21a.

On August 10, 1987, petitioner announced that he would again run for President. Four months later, he wrote to the Kentucky Secretary of State,[1] requesting that his name be presented to the Board for a decision on whether his name should be placed on the primary ballot. On January 11, 1988, petitioner was notified that because he was not a "nationally recognized" candidate, his name would not appear on the ballot. Pet. App. 20a. This was essentially the same ground on which petitioner was denied access to the ballot in 1980, and which the district court had found to be unconstitutional.

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[1] At the time, the Secretary of State was Drexel Davis. Davis was later succeeded by respondent Bremer Ehrler. Pet. App. 2a & n.1.

The following day, petitioner, again appearing pro se, filed the present lawsuit under the First, Fifth, Sixth, and Fourteenth Amendments to the Constitution and under 42 U.S.C. §§ 1981, 1983, 1985, and 1988. He requested that Ky. Rev. Stat. § 118.581 be declared unconstitutional; that his name be placed on the ballot for the Commonwealth's presidential preference primary scheduled for March 8, 1988; that his "candidates' deposit" of $1,000 be refunded; and that the Kentucky statute governing candidates' deposits—Ky. Rev. Stat. § 118.611—be declared unconstitutional on the ground that it discriminated against candidates who do not receive a certain percentage of total votes.[2] Pet. App. 1a-2a. On January 13, 1988, respondents—having ascertained that petitioner was the same person who had successfully filed suit in 1980—notified petitioner that his name had in fact been placed on the ballot. Pet. App. 20a.

Subsequently, both petitioner and respondents moved for summary judgment on petitioner's remaining claims. Pet. App. 2a. The district court referred the matter to a magistrate, who filed a report on September 13, 1988. Pet. App. 19a-28a. In his report, the magistrate stated that petitioner's lawsuit was not moot—even though the election was over and petitioner's name had appeared on the ballot—because "[t]he laws in question remain on the books and the problem posed for voters and future candidates, including [petitioner], remains unsolved without action." Pet. App. 20a-21a (citation omitted). Relying on *Kay v. Mills*, the magistrate recommended that Ky. Rev. Stat. § 118.581 be declared unconstitutional. He noted that "[t]he law has no greater

[2] Ky. Rev. Stat. § 118.611 provided that if a candidate failed to receive three percent of the vote cast in his party's primary, the $1,000 candidates' deposit would "escheat to the Commonwealth and be placed in a special trust and agency fund to be used by the secretary of state to defray election expenses."

constitutional support now than it did in 1980 . . . ." Pet. App. 21a. Regarding the candidates' deposit statute, the magistrate found that Ky. Rev. Stat. § 118.611 violated the Due Process and Equal Protection Clauses because it "impose[d] fees only on minority candidates." Pet. App. 24a.

Although the magistrate stated that petitioner should be awarded "litigation costs" under 42 U.S.C. § 1988, he recommended that petitioner be denied his request for attorney's fees under that statute. The magistrate reasoned that the latter issue was controlled by the Sixth Circuit's decision in *Falcone v. IRS*, 714 F.2d 646 (6th Cir. 1983), *cert. denied*, 466 U.S. 908 (1984), which held that a pro se attorney was ineligible for attorney's fees in an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(E). Pet. App. 27a-28a.

Both petitioner and respondents filed objections to the magistrate's report. The district court, after considering the objections de novo, concluded that the magistrate's recommendations were "correct in all respects" and thus adopted them as its own. Pet. App. 12a. The court thus held that both Ky. Rev. Stat. § 118.581 and Ky. Rev. Stat. § 118.611 were unconstitutional. On the issue of attorney's fees, the court summarily rejected petitioner's argument, noting simply that the magistrate had correctly analyzed the issue. Pet. App. 16a.

Petitioner appealed the denial of attorney's fees, and a divided panel of the Sixth Circuit affirmed. Pet. App. 1a-11a. The court acknowledged at the outset that while most circuits had denied attorney's fees under 42 U.S.C. § 1988 to nonlawyers appearing pro se, "courts have seen quite a different issue when the pro se civil rights plaintiff was also an attorney." Pet. App. 5a. The court noted that the cases were divided, with most courts concluding that a pro se attorney is entitled to attorney's fees under 42 U.S.C. § 1988. Pet. App. 5a-6a & n.2.

The court pointed out that several courts addressing the issue had looked for guidance to attorney's fees case law under the FOIA. Pet. App. 6a-7a. In that context as well, the court acknowledged, the decisions were divided. Pet. App. 7a. Nonetheless, since the Sixth Circuit, in *Falcone v. IRS*, had specifically held that pro se attorneys could not recover fees in the FOIA context, the court felt bound to follow that decision in the section 1988 context. Pet. App. 7a-9a.

Following its reasoning in *Falcone*, the court concluded that section 1988 "assumes a paying relationship between an attorney and a client." Pet. App. 8a. The court also stated that under *Falcone*, attorney's fees should not be allowed for a variety of policy reasons. Specifically, the court held fees should be denied because attorneys who handle their own cases cannot screen them objectively to eliminate meritless ones; because pro se attorneys do not suffer any "actual pecuniary losses for which [they] should be compensated"; and because of the risk of creating a "cottage industry" of inactive lawyers filing pro se civil rights cases. Pet. App. 7a (citing 714 F.2d at 647-48).

Judge Jones dissented. Pet. App. 9a-11a. While he "[did] not challenge *Falcone's* reading of the statutory purposes underlying the FOIA," he stated that "the concern [raised in *Falcone*] with 'objective' lawsuits and a cottage industry of fee-generating lawyers is not as great [under section 1988]." Pet. App. 10a-11a.[3]

[3] On May 16, 1990, the Sixth Circuit denied petitioner's motion for extension of time for filing a petition for rehearing. Pet. App. 30a.

SUMMARY OF ARGUMENT

Section 1988's language establishes three conditions that must be satisfied before the courts have authority to award attorney's fees: the party seeking fees must be the "prevailing party"; the amount sought must be "reasonable"; and the service must have been provided by an "attorney." Here, there is no dispute with respect to these three conditions. Petitioner unquestionably prevailed, and the reasonableness of his fees is not at issue. Similarly, the courts below recognized that petitioner is a licensed attorney. Pet. App. 3a, 16a, 27a. Petitioner therefore has done all that the statute requires for an award of attorney's fees.

Given the straightforward structure of section 1988, and the direct manner in which pro se attorneys, such as petitioner, satisfy the statute's conditions, it is hardly surprising that the vast majority of courts to address the issue have concluded that pro se attorneys are eligible for a section 1988 fee award. The court of appeals below, however, has chosen to reject these authorities and construed the statutory text to require a paying attorney-client relationship. In offering this interpretation, the court below has ignored *Blum v. Stenson*, 465 U.S. 886 (1984), where the Court held section 1988 did not premise eligibility for fees on such a relationship. Similarly, the court below ignored this Court's directive in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (per curiam), that the fee-shifting provisions of the 1964 Civil Rights Act—provisions upon which section 1988 was modeled—are to be construed broadly, allowing fees unless special circumstances would render the award unjust. No such special circumstances are presented here.

The legislative history of section 1988 confirms that pro se attorneys are eligible for a fee award. Section 1988 was drafted in direct response to *Alyeska Pipeline Serv. Corp. v. Wilderness Soc'y*, 421 U.S. 240 (1975), in which the Court held that federal courts had no power to award

fees absent specific Congressional authorization. The parties seeking fees in *Alyeska* included organizations proceeding on their own behalf, litigants indistinguishable from pro se attorneys. In providing the necessary authority for fee-shifting in the civil rights context, Congress expressly noted that pro se organizations, such as those involved in *Alyeska*, were eligible for a fee award. H. R. Rep. No. 1558, 94th Cong., 2d Sess., 8 n.16 (1976). Pro se attorneys, such as petitioner, are indistinguishable from organizations litigating on their own behalf. And any effort to distinguish between pro se attorneys and pro se organizations would enmesh the courts in repeated litigation. Nothing in the legislative history suggests Congress intended such a case-by-case assessment of the eligibility for fees.

Finally, denying fees to pro se attorneys is inconsistent with Congress' strong policy in favor of vigorous private enforcement of the civil rights laws. The legislative history indicates that Congress intended to rely heavily on private enforcement efforts, like those of petitioner in this case, to vindicate the rights ensured by the civil rights laws. Congress viewed broad availability of fee awards as an important mechanism to encourage such enforcement. By denying fees to pro se attorneys, the court below undermined that statutory scheme. To allow full and effective enforcement of the civil rights laws, the decision below must be reversed.

ARGUMENT

I. THE LANGUAGE OF SECTION 1988 REQUIRES AN AWARD OF ATTORNEY'S FEES FOR PREVAILING PRO SE ATTORNEYS IN CIVIL RIGHTS CASES

As the court below acknowledged (Pet. App. 5a), the great weight of authority holds that pro se attorneys, such as petitioner, are entitled to fees under section 1988. *See, e.g., Duncan v. Poythress*, 777 F.2d 1508 (11th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1129 (1986); *Ellis v. Cassidy*, 625 F.2d 227 (9th Cir. 1980); *Shakman v. Democratic Org. of Cook Cty.*, 634 F. Supp. 895 (N.D. Ill. 1986); *Lanasa v. City of New Orleans*, 619 F. Supp. 39 (E.D. La. 1985); *Rybicki v. State Bd. of Elections*, 584 F. Supp. 849 (N.D. Ill. 1984) (three judge court). As one court succintly stated, "[a] litigant does not lose his entitlements as an attorney merely by virtue of his self representation." *Jones v. Lujan*, 883 F.2d 1031, 1035 (D.C. Cir. 1989).

The language of section 1988 requires that result. That section provides, in relevant part, that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. This language establishes three conditions that must be satisfied before the court has discretion to award attorney's fees: the party seeking the fees must have prevailed; the fees claimed must be reasonable; and the service must have been provided by an attorney.[4]

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[4] Some courts and commentators have read the term "attorney" more generically, as anyone who performs legal services, including pro se non-attorneys, and have taken the position that non-attorneys are entitled to "a reasonable attorney's fee." *See, e.g., Cox v. Department of Justice*, 601 F.2d 1, 5-6 (D.C. Cir. 1979); Note, *Awarding Attorney's Fees to Prevailing Pro Se Litigants*, 80 Mich. L. Rev. 1111 (1982); Note, *To Fee, or Not to Fee: The Dilemma of the Pro Se Attorney In Collecting Attorney's Fees*, 16 W.St.

There is no dispute that petitioner is the "prevailing party," since the district court accepted his position and struck down both Ky. Rev. Stat. § 118.581 and Ky. Rev. Stat. § 118.611 as unconstitutional. The reasonableness of petitioner's fees is not at issue. Finally, there is no dispute that petitioner qualifies as an "attorney." The court of appeals expressly recognized (Pet. App. 3a) his status as "a licensed attorney," as did the magistrate (Pet. App. 27a), whose views were accepted by the district court (Pet. App. 16a). Petitioner therefore has done all that the statute requires for an award of attorney's fees. *See, e.g., Jones*, 883 F.2d at 1034-35 (noting that language of Equal Access to Justice Act compels a fee award for a pro se attorney "because he was represented by an attorney and he was the prevailing party").

Rejecting the clear weight of authority, the Sixth Circuit refused to award petitioner attorney's fees on the ground that a pro se attorney is ineligible for such an award. In reaching this view, the court, apparently attaching great significance to the terms "fees" and "costs," concluded a fee award was appropriate only where a "paying relationship between an attorney and a client" had led to "actual pecuniary losses." Pet. App. 8a. This interpretation, however, has already been considered and rejected by this Court in *Blum v. Stenson*, 465 U.S. 886 (1984), a case the courts below failed even to cite.

The issue in *Blum* was whether respondents, who were represented by the Legal Aid Society of New York, were entitled to attorney's fees under section 1988. The Legal

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U.L. Rev. 303 (1988); Note, *Attorney Fees, Freedom of Information, and Pro Se Litigants: Per Se Prohibitions Frustrate Policies*, 26 Wm. & Mary L. Rev. 349 (1985); Note, *Fees for the Taxpaying Fool: IRC Section 7430 Fee Awards To Pro Se Attorneys*, 38 Case W. Res. L. Rev. 408 (1988). While this Court need not resolve that issue here, petitioner submits that such a construction appears to push the language too far, and that given the reference to "attorneys," the best construction of section 1988 is that it should be governed by its plain language to require the involvement of a licensed attorney.

Aid attorneys did not charge respondents for the representation, but after prevailing sought a fee award pursuant to section 1988. The lower courts approved an award based on prevailing market rates in New York City. The petitioner argued for a requirement "that all fee awards under § 1988 be calculated according to the cost of providing legal services rather than according to the prevailing market rate." 465 U.S. at 892 (footnote omitted).[5] The Court rejected these arguments for a "cost-based standard" and refused to premise fee eligibility on the particular type of legal counsel:

> The statute and legislative history establish that 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community, *regardless of whether plaintiff is represented by private or non-profit counsel.*

Id. at 895 (footncte omitted; emphasis added). In the face of *Blum*, the court of appeals' assertion (Pet. App. 8a) that pro se attorneys are entitled to no award because no fee was paid and they incur no "actual pecuniary losses" simply collapses.

In construing section 1988, the courts below not only failed to follow the language of the statute; they also failed to follow the principles announced by this Court in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (per curiam), which require that section 1988 be read as creating a presumption in favor of the award of fees. In *Newman*, the Court construed identical language of Title II of the 1964 Civil Rights Act to require that prevailing plaintiffs should "ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 402. Noting that Congress chose to "rely in part upon private litigation as a means of

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[5] The Solicitor General, in an *amicus curiae* brief, argued that the Court should "adopt a cost-related standard only for fee awards to nonprofit legal aid organizations." 465 U.S. at 892.

securing broad compliance with the law," *id.* at 401 (footnote omitted), the Court viewed Title II's fee provisions as intended principally "to encourage individuals injured by racial discrimination to seek judicial relief." *Id.* at 402. Thus, the *Newman* Court establishes a presumption in favor of awarding fees. *Accord, e.g., Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416-17 (1978) (reviewing standard and noting its applicability to Title VII of the 1964 Civil Rights Act).

Significantly, in enacting section 1988, Congress "track[ed] the language of the counsel fee provisions of Titles II and VII," and explicitly directed the courts to apply the *Newman* presumption. *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976) (Senate Report), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5910; H.R. Rep. No. 1558, 94th Cong., 2d Sess. 5 (1976) (House Report). Consequently, any doubt as to the scope of section 1988 should be resolved in favor of awarding fees.

II. THE LEGISLATIVE HISTORY OF SECTION 1988 CONFIRMS THAT PRO SE ATTORNEYS ARE ELIGIBLE FOR ATTORNEY'S FEES

A. Section 1988 Was Drafted In Response To This Court's Decision In *Alyeska Pipeline*, Which Involved Organizational Litigants Indistinguishable From Pro Se Attorneys

The fact that the language of section 1988, by its terms, encompasses pro se attorney litigants should not be surprising. The statute was enacted in direct response to this Court's decision in *Alyeska Pipeline Serv. Corp. v. Wilderness Soc'y*, 421 U.S. 240 (1975), a case involving organizational plaintiffs that are indistinguishable from pro se attorneys.

At common law, the "general practice" in the United States was to not award fees to the prevailing party. *Aracambel v. Wiseman*, 3 Dall. 306 (1796). As early as

1789, however, Congress began to authorize awards of attorney's fees, providing that the federal courts were to follow state law (*Alyeska*, 421 U.S. at 247-49 & nn. 19-20), which at least in some jurisdictions allowed recovery by pro se attorneys.[6] This practice of referring to state law was followed until 1853, when "Congress undertook to standardize the costs allowable in federal litigation." *Id.* at 251. Motivated by a concern that under state law "losing litigants were being unfairly saddled with exorbitant fees for the victor's attorneys," Congress severed the link between federal practice and state law. *Id.* at 251-52. Thus, Congress established a list of specific sums that would be awarded by the courts for various tasks, such as twenty dollars for a trial or final hearing in a civil, criminal, or admiralty case. *Id.* at 252-53 (citing Act of Feb. 26, 1853, 10 Stat. 161). With the exception of the small amounts allowed pursuant to the 1853 statute (now recodified as 28 U.S.C. § 1923), attorney's fees were not recoverable in federal court absent a specific authorizing statute. 421 U.S. at 255-57.

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[6] An early annotation suggests that, under the state laws of this era, pro se attorneys were entitled to fees, noting that "[a]n attorney who appears for himself in a suit to which he is a party is entitled to the same attorney's fees which could be taxed if he appeared for another." 5 American and English Annotated Cases 834 (W. McKinney, D. Garland & H. Greene eds. 1907). More recently, the states have divided on the issue, with a majority of the state courts that have considered the question allowing fees for pro se attorneys. *See, e.g., Quick & Reilly, Inc. v. Perlin*, 411 So.2d 978 (Fla. App. 1982) (awarding fees to pro se attorney); *Winer v. Jonal Corp.*, 169 Mont. 247, 545 P.2d 1094 (1976) (same); *Wells v. Whinery*, 34 Mich. App. 626, 192 N.W.2d 81 (1971) (same); *contra, e.g., O'Connell v. Zimmerman*, 157 Cal. App.2d 330, 321 P.2d 161 (1958); *City of Long Beach v. Sten*, 206 Cal. 473, 274 P. 968 (1929); *Chency v. Ricks*, 168 Ill. 533, 48 N.E. 75 (1897); *cf. Consumers Lobby Against Monopolies v. Public Util. Comm'n*, 25 Cal.3d 891, 915 n.13, 603 P.2d 41, 55 n.13, 160 Cal. Rptr. 124, 138 n.13 (1979) (questioning logic of prior decisions denying fee awards to pro se attorneys and suggesting that a pro se attorney "should be compensated when he represents himself").

In *Alyeska*, the District of Columbia Circuit had developed a broad exception to this principle, allowing fees whenever litigants act as "private attorney generals" and vindicate important statutory rights. 495 F.2d at 1026. The parties seeking fees were three environmental organizations—the Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth—that were represented by either in-house counsel or attorneys serving pro bono. *See id.* at 1037; Pet. Sup. Ct. Br. in *Alyeska* at 43. In awarding fees, the court of appeals made no distinction between the situation in which the organization represented itself and the situation in which the organization was represented through pro bono private counsel. Rather, the court directed that the amount of the fee award be set in accordance with the "reasonable value of [the attorneys'] services," and called for the same type of payment "whether [the] organization is a litigating party or a public interest law firm or defense fund." 495 F.2d at 1037.

This Court reversed. 421 U.S. at 247. Pointing to the historical acceptance of the "American Rule," the Court noted that Congress had made "specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights." *Id.* at 260 (footnote omitted). The Court concluded that, absent express statutory authority, the federal courts do not have the power to award attorney's fees to a prevailing party. *Id.* at 269. Again, however, this Court did not suggest that any distinction existed between the situation where the organization represented itself and the situation where it was represented by outside counsel.

The enactment of section 1988 followed shortly after *Alyeska* and was a direct response to that decision. On August 1, 1975, a little over two months after *Alyeska*, Senator Tunney introduced a bill to remedy "an unexpected and anomolous gap in [the] civil rights laws" that had been created by this Court's decision in *Alyeska*. 121 Cong. Rec. 26,806 (1975) (statement of Sen. Tunney).

Referring to other statutes with similar provisions, Senator Tunney noted that his bill "simply applies the type of 'fee-shifting' provision already contained in titles II and VII of the 1964 Civil Rights Act to the other civil rights statutes which do not already specifically authorize fee awards." *Id.*

By legislatively endorsing the type of suit brought in *Alyeska*, Congress intended to make fees broadly available to organizational litigants, without regard to whether the organization represented itself or was retained for purposes of the litigation. Indeed, the legislative history makes this precise point:

> [A] prevailing party is entitled to counsel fees even if represented by an organization *or if the party is itself an organization.*

House Report at 8 n.16 (emphasis added; citations omitted). This language clearly envisions that an organization that represents itself is entitled to attorney's fees.

An attorney representing himself, such as petitioner, is indistinguishable from the pro se organizations that Congress expressly indicated should receive attorney's fees under section 1988. A pro se organizational litigant simultaneously appears as the party and provides the legal representation. The same is true of a pro se attorney. Indeed, contrary to Congress' clear intent, the principal factors relied upon by the court of appeals below in refusing to award fees to petitioner would also apply to bar recovery of fees by a pro se organization.

First, the court reasoned (Pet. App. 8a) that "a statutory provision for attorney's fees assumes a paying relationship between an attorney and a client." This conclusion clearly does not differentiate pro se attorneys from organizational litigants, neither of which pays a fee for specific legal services. Furthermore, as *Blum* makes clear, 465 U.S. at 896, nothing in the statute's

language or history suggests that a traditional paying attorney-client relationship must exist. *Accord, e.g.*, House Report at 8 n.16.

Second, the court of appeals asserted that denying fees to pro se attorneys would help avoid meritless suits by requiring the presence of an independent attorney. According to the court (Pet. App. 7a), granting such awards would undermine Congress' purpose of " 'encourag[ing] potential claimant[s] to seek legal advice before commencing litigation' " so that the attorney could perform an objective "filtering" function. This rationale is difficult to understand—since section 1988 only provides for recovery to successful litigants—and likewise provides no basis for distinguishing pro se attorneys from organizational litigants. There is no reason to believe that the employee of an organizational litigant has significantly more objectivity in assessing a case than a pro se attorney. In both settings, the critical point is that a trained lawyer has evaluated the claim before commencing litigation. If anything, the organization's attorney is less objective in evaluating potential lawsuits, since his sole job is to represent his organization. By contrast, as several courts have recognized, a pro se attorney must weigh the prospects of prevailing in a civil rights suit against the lost opportunity to represent a paying client. *See, e.g., Duncan*, 777 F.2d at 1512; *Ellis*, 625 F.2d at 231; *Rybicki*, 584 F. Supp. at 860.

Third, the court of appeals reasoned (Pet. App. 8a) that because petitioner has not incurred any "legal costs" or "actual pecuniary losses," he cannot recover under section 1988. This contention offers no basis for distinguishing pro se attorneys; like pro se attorneys, organizational litigants incur no "actual pecuniary losses." In any event, as discussed above, the court of appeals' position has already been considered and rejected by this Court in *Blum*.

Fourth, the court of appeals expressed concern over a "cottage industry" of "inactive lawyers who would support themselves on statutory fee awards for self-generated litigation"—a concern founded on the court's own " 'belie[f] that Congress [did not] intend[] to so subsidize attorneys without clients.' " Pet. App. 7a (quoting *Falcone v. IRS*, 714 F.2d at 648). On a superficial level, this concern could serve to distinguish pro se attorneys from organizational litigants. Any attempt to draw such a distinction, however, would enmesh the courts in a case-by-case assessment of the attorney-client relationship, lead to inappropriate line-drawing, and invite evasion.

For example, under the court of appeals' approach, petitioner presumably would be entitled to fees had he structured his lawsuit differently. For example, he could have formed an organization for the purpose of promoting his candidacy in Kentucky, and then filed the suit in the name of that organization. Similarly, petitioner could have sought to initiate a class action on behalf of all minority candidates, or, indeed, on behalf of all presidential candidates forced to comply with Kentucky's unconstitutional electoral scheme. Likewise, he could have named a family member as the party, or simply located a Kentucky voter willing to lend his or her name to the suit. Any of these, or a myriad of other, configurations would have presented the courts below with the identical substantive issue and the identical attorney. Yet, under the reasoning of the courts below, eligibility for attorney's fees in any of these situations would hinge upon how the court chooses to characterize the substance of the relationship.

Given that many, if not most, civil rights cases involve only injunctive relief, a fee award takes on heightened importance as the only means to recoup any of the costs involved in pursuing the litigation. Civil rights litigants therefore have a strong incentive to preserve their elig-

ibility for such awards. This incentive, coupled with the difficult line drawing inherent in the court of appeals' approach, will foster repeated litigation over the appropriate categorization of various attorney-client relationships.

Nothing suggests that Congress intended eligibility for fee awards to turn on this type of case-by-case analysis. Moreover, as discussed in the next section, the court of appeals' "cottage industry" concern is at odds with the central purposes of section 1988.[7]

B. Awarding Fees To Pro Se Attorneys Promotes Section 1988's Goal of Ensuring Full And Effective Enforcement Of The Civil Rights Statutes

The court of appeals' cottage industry concern is either a concern (1) that meritorious suits may be brought or (2) that unmeritorious suits may be brought. The former concern is entirely inappropriate; the latter concern is unsupported.

Section 1988 was specifically designed to encourage the bringing of meritorious civil rights claims. The statute's legislative history makes clear that the civil rights laws "depend heavily on private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." Senate Report at 2. Indeed, the Senate

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[7] Other courts have identified additional policy concerns, but those concerns are applicable only to pro se non-lawyers. *See, e.g., Owens-El v. Robinson*, 694 F.2d 941, 942-43 (3d Cir. 1982) (expressing concern with lack of representation by professionally trained advocates); *Ellis*, 625 F.2d at 231 (expressing concern about the ability of courts to value the services of non-attorney litigants but noting that "[t]he difficulty of placing a dollar value on the legal services performed" does not arise when the party is a lawyer, who typically "has established fees and billing practices").

Report observed that "'[n]ot to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose.'" *Id.* at 3 (quoting *Hall v. Cole*, 412 U.S. 1, 13 (1973)). Similarly, the House Report and the floor debate in the Senate make clear that "[t]he effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens." House Report at 1; 122 Cong. Rec. 31,471 (1976) (statement of Sen. Scott). For the statutes to be effective, therefore, private citizens must be encouraged to bring lawsuits vindicating civil rights; authorizing attorney's fees was one way Congress offered such encouragement. Denying fees to pro se attorneys would undercut Congress' intent to foster private enforcement actions.[8]

Pro se attorneys have, in fact, made important contributions toward private enforcement efforts, uncovering serious constitutional violations. For instance, the plaintiffs in *Duncan* successfully challenged the refusal of Georgia state officials to call a special election to fill a vacancy on the state supreme court as a violation of their constitutionally protected right to vote. 777 F.2d at 1509. Similarly, in *Rybicki*, a group of plaintiffs, including a pro se attorney, vindicated voting rights by attacking a legislative redistricting plan for election of candidates to the Illinois General Assembly. 584 F. Supp. at 853; *see also Shakman v. Democratic Org. of Cook*

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[8] The interpretation of section 1988 could have farreaching implications for many other fee-shifting statutes, which contain wording virtually identical to section 1988. Indeed, as noted, section 1988 was patterned after the attorney's fees provisions in Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), 42 U.S.C. § 2000e-5(k). The wording of section 1988 is also essentially identical to the Voting Rights Act attorney's fees provision, 42 U.S.C. § 1973(1)(e). Several other attorney's fees statutes, while not identical to section 1988, contain wording that, for all practical purposes, is indistinguishable. These include, among others, the Equal Access to Justice Act, 28 U.S.C. § 2412(b) and (d); the Truth in Lending Act, 15 U.S.C. § 1640(a)(3); and the Copyright Act, 17 U.S.C. § 505.

Cty., 634 F. Supp. at 898 (successful equal protection challenge to patronage practices of Democratic and Republican parties). Indeed, the claims raised by petitioner in this case strongly illustrate the point: petitioner fought and won two lawsuits challenging Kentucky's system for placing presidential primary candidates on the ballot, an issue that the magistrate noted (Pet. App. 20a) affected not just petitioner but also all "voters and future candidates." Denial of attorney's fees to pro se attorneys would hamper this important category of litigants' efforts to expose civil rights violations, undermining Congress' intent to promote vigorous private enforcement of the civil rights laws.

Denying fees to pro se attorneys also would undermine the deterrence value of fee awards. Congress has recognized that the additional cost imposed on a defendant forced to pay attorney's fees can help deter violations of the law, *see, e.g.*, S. Rep. No. 853, 93d Cong., 2d Sess. 17 (1974) (FOIA Committee Report), an effect with heightened importance in the civil rights context where, frequently, the only relief is injunctive. Moreover, denying fees to pro se attorneys results in a windfall to defendants responsible for violating the civil rights laws, who escape liability for attorney's fees solely because the party bringing the private enforcement action happens to be a pro se attorney. Congress' goals would be seriously undermined if fee awards were denied to successful pro se attorney litigants.

If the Sixth Circuit's concern is with unmeritorious suits, the very structure of section 1988 eliminates this concern. Fee awards are available only for "prevailing parties," so inactive attorneys have no incentive to bring frivolous pro se lawsuits. If, nonetheless, frivolous suits are brought, or there are other reasons why the fees sought are not justified in a specific case, adequate mechanisms are available to address the problem. The statute commits the award of fees to the courts' "discretion."

In addition, the legislative history directs that the amount of the fee must be determined with reference to an established framework within which a pro se attorney's "inactive" practice would figure into calculation of the appropriate fee award. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974); House Report at 8 (endorsing *Johnson* factors); Senate Report at 6 (same); *see also Hensley v. Eckerhart*, 461 U.S. 424, 429-30 n.3 (1983) (discussing and applying *Johnson* factors). Finally, sanctions and other remedies are available to address truly frivolous litigation. *See* Fed. R. Civ. P. 11; Fed. R. App. P. 38; *Christiansburg Garment Company*, 434 U.S. at 421 ("a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith").

"Inactive lawyers" therefore have an incentive to initiate pro se litigation only if they identify serious constitutional violations. Contrary to the court of appeals' suggestion, this is precisely the type of private enforcement that Congress intended to encourage. *See* House Report at 1.

Indeed, even without this strong Congressional policy favoring vigorous civil rights enforcement—a policy the court below ignored—the court's concern about a "cottage industry" is unfounded. As the court below conceded (Pet. App. 5a), the vast majority of courts allow fee awards to pro se attorneys in civil rights cases, and there is no indication that such a cottage industry has developed. To the contrary, the case law suggests that pro se attorneys have responded selectively, identifying and rectifying important civil rights violations rather than making a career out of bringing such suits. *See, e.g., Duncan*, 777 F.2d at 1509; *Rybicki*, 584 F. Supp. at 853.

In sum, the Sixth Circuit has misread the language of section 1988, misapplied its purposes, and ignored this Court's governing case law. If allowed to stand, the decision below would undermine the full and effective enforcement of the civil rights laws.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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